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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

JOY OIL COMPANY, LTD.,
a Canadian corporation,
Plaintiff and Appellant,

v.

No. 223

STATE TAX COMMISSION,
Defendant and Appellee.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR JOY OIL COMPANY, LTD.

OPINION BELOW

The opinion of the Supreme Court of the State of Michigan is reported in 321 *Michigan Reports* 335 (R. 33-42).

JURISDICTION

The Order of the State Commission was affirmed by the Supreme Court of Michigan on May 18, 1948 (R. 33-42). The Petition for a Writ of Certiorari was filed August 16, 1948, and was granted October 11, 1948. The

jurisdiction of this Court is conferred by Section 237(a) *Judicial Code* (28 U.S.C.A. Section 344(a), 861(a) F.C.A. Title 28, Sec. 344(a)).

STATEMENT OF THE CASE

(Figures in parentheses refer to pages of printed record unless context clearly indicates otherwise)

On April 1, 1947, the Assessors of the City of Dearborn assessed the gasoline stored in bulk plants leased by the Joy Oil Company, Ltd., of Canada within the City of Dearborn at a valuation of $78,780.00. A protest was made to the Board of Review that the gasoline was not subject to assessment and tax for the reason that it was a commodity in foreign commerce. The protest was denied. Whereupon on June 7, 1947, an appeal was taken to the State Tax Commission for the reason that commodities in foreign commerce coming temporarily at rest in Michigan pending trans-shipment to a foreign country are not subject to local taxation; that the assessment and the tax levy pursuant thereto was contrary to Section 9, sub-paragraph (5), and Section 10, sub-paragraph (2), Article I of the United States Constitution. On December 30, 1947, the State Tax Commission gave notice denying the appeal (3, 5).

The Joy Oil Company, Ltd., is a Canadian corporation not authorized to do business in the state of Michigan. It owns no property within the state of Michigan except that on the assessment date, April 1, 1947, it had in storage at Dearborn, Michigan, a large quantity of gasoline awaiting trans-shipment to Canada. The Joy Oil Company, Ltd., had purchased 1,500,000 gallons of gasoline from the Midwest Refineries Incorporated of Grand Rapids, Michigan (3).

At the time of purchase, pursuant to Federal statutes, it furnished to the Midwest Refineries Incorporated an Exemption Certificate, duly sworn to, and also a Temporary Exemption Certificate Form 798 U. S. Treasury Department, Bureau of Internal Revenue, duly sworn to, to comply with (a) the requirements of the Federal Manufacturers Excise Tax, and (b) to the carrier in compliance with the Federal Railroad Transportation Act (4).

The purpose was to show that neither of the Federal taxes could be assessed against the gasoline in question since it was a commodity in foreign commerce, thereby the Joy Oil Company, Ltd., benefited by the lower export freight rates (3, 4, 20, 21).

The gasoline was transported from Grandville and Alma, Michigan, upon export bills of lading marked "For export to Canada" (23, 24). The total amount of this gasoline was in storage in Dearborn on April 1, 1947, except 50,000 gallons which had been transported by truck over the Ambassador Bridge into Canada until a Federal regulation was issued prohibiting the transportation of any inflammable materials over any international bridge (4).

The gasoline remained in storage for about fifteen months because of inability to charter a boat to transport the gasoline to Canada. In July 1947 a boat was chartered and all of the gasoline in question was transported to Canada (4). Excise Form K, Proof of Export, was furnished to Midwest Refineries Incorporated, the vendor (24, 26).

Following the sustaining of the tax as assessed by the Board of Review of the City of Dearborn by the State Tax Commission, petitioner appealed by certiorari to the Supreme Court of Michigan (1). Leave to appeal was granted. The Michigan Supreme Court by its decision of May 16, 1948 affirmed the action of the

State Tax Commission. It is this decision of the Michigan Supreme Court which petitioner seeks to have reviewed and reversed.

QUESTION PRESENTED

Is a commodity in foreign commerce which temporarily comes at rest between a prior rail shipment and a subsequent boat shipment into a foreign country subject to a local ad valorem tax while it is stored by the river front in a municipality pending such transshipment?

SPECIFICATION OF ERROR TO BE URGED

The Supreme Court of the state of Michigan erred in holding that the commodity was subject to an ad valorem tax because the storage at Dearborn, Michigan for fifteen months was a break of the continuous shipment and since there was no continuity of transportation from the point of shipment to the destination in foreign commerce, it was not exempt from local taxation under the Export-Import Clause of the Constitution of the United States.

SUMMARY OF ARGUMENT

1. When the seller in Michigan and the buyer in Canada intend that the commodity should be exported, and that intention had been put into effect by shipping to the port on a bill of lading marked "For export to Canada" followed by storage at or near the port of export by reason of convenience of the transportation process, its temporary detention does not remove it from foreign commerce.

A. G. Spalding & Bros., vs. William H. Edwards, Collector of Internal Revenue, 262 U. S. 66;

Carson Petroleum Co. vs. Vial, 279 U. S. 95;

Baldwin vs. Patk. Exchange, 263 U. S. 291.

2. The essential character of the commerce, not the fact of local or through bill of ladings, or a rebilling or reshipment enroute, or a plurality of carriers, determines whether it is foreign commerce.

Railroad Commission vs. Worthington, 225 U. S. 101;

Southern P. Terminal Co. vs. Interstate Commerce Commission, 219 U. S. 498.

3. The shipment of the gasoline to Dearborn by rail and storage there pending trans-shipment to Canada was but a step in its transportation to its real and ultimate destination in a foreign country.

Texas & N. O. R. Co. vs. Sabine Tram. Co., 227 U. S. 111.

4. The City of Dearborn is precluded from imposing an ad valorem tax on the gasoline in question under Export-Import Clause of the Constitution of the United States. (Article I, Section 10). Such a tax is unconstitutional.

Richfield Oil Corp. vs. State Board of Equalization, 329 U. S. 69 (67 Sup. Ct. 156, 91 L. Ed. 80).

ARGUMENT

Is a Commodity in Foreign Commerce which Temporarily Comes at Rest Between a Prior Rail-Shipment and a Subsequent Boat-Shipment into a Foreign Country Subject to a Local Ad Valorem Tax While it is Stored by the River Front in a Municipality Pending Such Transhipment?

As applied to the case at bar, the question presented might be stated: Is gasoline sold by refineries in Michigan to a Canadian corporation and shipped by rail to a point which is a port for shipment upon the Great Lakes and stored there in tanks pending transshipment by boat to Canada tax exempt under the Export-Import Clause of the Constitution of the United States? The Export-Import Clause of the Constitution of the United States is Section 10, sub-paragraph 2 of Article I and reads:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imports, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

This being an ad valorem tax under the general tax laws of the state of Michigan, the exception is not involved. Because there is a single exception, no other qualification of the absolute provision against taxation by a state or its subdivisions was intended. No question is raised here as to the constitutionality of the tax laws, but in the case at bar, the general tax laws of Michigan were applied in a way that is unconstitutional.

The tax levied is unconstitutional under the above quoted section of the United States Constitution.

It was the theory of the Michigan Supreme Court in its decision that an interruption of the journey to a point in a foreign country defeated the theory of a continuous journey and at the point of interruption within the state of Michigan the commodity was subject to an ad valorem tax. In the course of its opinion, the Michigan Supreme Court said:

> "If the rail shipments had been billed to Toronto, Canada, the transportation might have been continuous by rail across or under the Detroit River to Canada" (39).

In effect it held that it would be necessary to have a through bill of lading from the point in Michigan to the point in Canada which was the destination of the shipment. That would require a through shipment by rail. The purchaser elected to ship by rail to the Lake Port located at Dearborn, Michigan, a suburb of Detroit, and there accumulate the gasoline in its storage tanks in sufficient quantity for a boatload and then ship over the Great Lakes from Dearborn to Toronto or other points in Canada. A through bill of lading is not possible when there is a transfer from rail to boats not owned by the railway company.

In the case of *Railroad Commission vs. Worthington*, 225 U. S. 101, coal from the Ohio mines intended for transportation on the Great Lakes was stored for *some weeks or months* on docks in Cleveland for delivery beyond the lakes. The question was whether the coal was subject to interstate rates. In the course of the opinion so holding it was said:

> "Ordinarily the question whether particular commerce is interstate or intrastate is determined by

> what is actually done and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one state to another, a rebilling or reshipment enroute does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. As this court often has said, it is the essential character of the commerce, not the accident of local or through bill of lading that is decisive."

The quoted paragraph of the opinion completely refutes the above stated theory of the Supreme Court of Michigan.

It may be stated as a general principle that where the seller and buyer intend that the gasoline should be exported and comes to rest temporarily at or near the port of export by reason of convenience of the transportation process, its temporary detention would not remove it from foreign commerce.

> *Buiderup vs. Pathe Exchange*, 263 U. S. 291, 309, (68 L. Ed. 308, 316).

In the case at bar, the Joy Oil Company, Ltd., a Canadian corporation, was the purchaser. As pointed out in the statement of the case, it procured and furnished all the usual export papers issued by the custom authorities. This procedure gave to the commodity the essential character of the commerce which was foreign commerce.

The Supreme Court of Michigan further said in holding the gasoline subject to an ad valorem tax in Michigan:

> "There was no continuity of transportation at Detroit or Dearborn which would require exemption from taxation under the decisions relied upon by appellant" (7).

The Court then concluded its opinion by saying:

> "Under the circumstances of the case at bar, we conclude that there was no continuity of transportation from the point of shipment to destination in foreign commerce" (42).

It is clear that the Supreme Court of the State of Michigan interrupted the cases of this Court to hold that if there was a break in the transportation by transferring the commodity from a rail shipment to a storage tank and then from a storage tank to a boat that there was such a lack of continuity of transportation as to render the commodity subject to ad valorem taxation Such is not the tenor of the Export-Import Clause of the United States Constitution, or the cases of this Court interpreting that clause.

In the case of *Southern P. Terminal Co. vs. Interstate Commerce Commission*, 219 U. S. 498, cotton oil cake and meal destined for export was bought by the intending exporter in Texas, Oklahoma, and Louisiana. It was shipped to him on bills of lading and waybills showing the point of origin in those states and the destination at Galveston. The purchases were made for export, there being no consumption of the products at Galveston. His sales to foreign countries were sometimes for immediate and sometimes for future delivery, irrespective of whether he had the product on hand at Galveston. There was some processing carried on at Galveston. The Court in deciding the case said:

> "The manufacture or concentration on the wharves of the terminal company are but incidents, under the circumstances presented by the record, in the transshipment of the products in export trade and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise would be to disregard, as the Commission said, the

substance of things and make evasions of the act of Congress quite easy. It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston, or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg & San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the terminal company being a part of the railway for such purpose. The case, therefore, comes under Coe v. Errol, supra, where it is said that goods are in interstate, and necessarily as well in foreign commerce when they have 'actually started in the course of transportation to another state or been delivered to a carrier for transportation'."

Therefore, contrary to the decision of the Michigan Supreme Court, when the gasoline was delivered to the Pere Marquette Railway Co. at Grandville and Alma, Michigan, all bills of lading marked for "Export"; it was delivered to a carrier for transportation to a foreign destination. From that point onward it was at all times a commodity in foreign commerce. In the cited case it was not important that the way bills showed the destination to be Galveston, and it is not important in the case at bar that the way bills showed the destination to be Detroit, Michigan, although the Michigan Supreme Court seems to make a point of that fact (39).

This case also stands for the proposition, contrary to the holding of the Supreme Court of the State of Michigan, that a through bill of lading is not essential to make the character of the commerce foreign, and also that the storage of the commodity at the port is not such an interruption of the continuity of the journey as to render the commodity subject to local control or taxation. The gasoline in question was purchased by the

Canadian corporation to supply a demand in the Dominion of Canada. Transshipment upon the Great Lakes after delivery by rail to a port on the Great Lakes was the best and most economical way of delivering the gasoline into Canada.

In the case of *Texas & N. O. R. Co. vs. Sabine Tram Co.*, 227 U. S. 111, the question was whether the rates charged on shipments of lumber on local bills of lading from one point in Texas to another, but destined for export, were intrastate or foreign commerce. The exporter purchased the lumber from other mills in Texas with which to supply its sales in part. It did not know when any particular car of lumber left the starting point into which ship or to what particular destination the contents of the car would ultimately go, or on which sale it would be applied; this not being found out until its agent inspected the invoice mailed to and received by him after the shipment. The lumber remained after arrival at the shipping port in the slips or on the dock until a ship chartered by the exporter arrived, then the exporter selected the lumber suited for that cargo and shipped it to its destination. This court held that the shipments to the point of shipment from other points of Texas were in interstate and foreign commerce and should pay rates accordingly. This Court said:

> "The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps of its transportation would be extremely artificial. Once admit the principle and means will be afforded of evading the national control of foreign commerce from points in the in-

terior of a state. There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the device of separate bills of lading, the commerce will be given local character, though it be essentially foreign."

The Court went on to hold that such would not give it a local character. Therefore, the language of the Michigan Supreme Court is refuted that the shipments should have been made from the point of origin in Michigan to Toronto, Canada, to make the journey continuous. The Court also pointed out that the absence of a definite foreign destination did not alter the character of the shipments; that there was not a break in the sense of the Interstate Commerce Law in the continuity of transportation of lumber to foreign countries by the delay and its transshipment at Sabine.

Although it is not necessary to the decision of the Michigan Supreme Court, it made a point of the fact that the gasoline remained in storage in Dearborn, Michigan for about fifteen months and that it was not transshipped by boat to Canada for approximately three months after April 1, 1947, the date of the assessment. In *Railroad Commission vs. Worthington*, supra, the coal from the Ohio mines was stored on docks in Cleveland for some weeks or months, but more in point is the case of *Coe vs. Errol*, 116 U. S. 517. In that case there were two lots of logs involved. One lot of logs was cut in Maine to be floated down river to Lewiston, Maine, but after starting on the journey one lot was detained for a *season* in New Hampshire by low water. In fact it was stipulated in the case that the timber cut in Maine over a period of years has always lain over one season, being about a year, in the Androscoggin River in the state of Maine, either in Errol or nearby towns, and that in accordance with the custom that the particular lot

of logs had lain over in Errol since the spring or summer before the taxation. In holding that these logs were not subject to taxation, this Court said:

> "This question does not present the predicament of goods in course of transportation through a state, although detained for a time within the state by low water or other causes of delay, as was the case of the logs cut in the state of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another state, or delivered to a carrier for such transportation."

It is to be seen that in the opinion the Court spoke both of the logs that had begun the interstate journey and were free from taxation and as to the logs that had not yet started the interstate journey. The first were held to be free from taxation and the latter subject to local taxation, but it was entirely immaterial that the logs were held in the river because of low water for a period in excess of a year. In the cited case apparently the logs were cut in the woods during the winter months of the year. They were then gathered and placed in the river and floated down to a point, such as Errol, in the spring months of the year. After they reached that point apparently the water was too low to continue the journey to the final destination in New Hampshire. Therefore, the logs were held in the river until high water the following spring.

In the case at bar during the winter of 1946, the gasoline was placed in tank cars of the Pere Marquette Division of the C. & O. Railway Company, and by that act delivered to the Canadian corporation. The gaso-

line at that point became the property of the Canadian corporation. The rail journey was then made from Grandville or Alma, Michigan to the Lake Port at Dearborn where it was placed in storage tanks until such time as a sufficient quantity would be gathered to make up a boatload to be transported to Canada when the Great Lakes were open for navagation in the spring, but it happened that in the navigation season of 1946 that there was such a shortage of tank steamers that the appellant was not able to charter a boat to take the gasoline over the Great Lakes into Canada. Due to the necessity of this transportation process, it was necessary to hold the gasoline in storage until the following summer when a boat was chartered and the gasoline all shipped to Canada. On the facts there is no distinction between the case of *Coe vs. Errol*, supra, and the case at bar in regard to the commodity that had already commenced the journey which was to take it out of the state.

The Supreme Court of Michigan rested its decision upon the case of *Coe vs. Errol*, supra but in so doing, it must have considered only the portion of the case that dealt with the logs which had not yet started its interstate journey.

In the foregoing portion of this brief we have answered the definite grounds upon which the Supreme Court of the State of Michigan upheld the tax. The remaining question is whether in the case at bar there is an export within the meaning of the constitutional provision and if so whether this tax was a prohibitive impost upon it. Under the decisions of this court it appears to be clear that these questions must be answered in the affirmative. In reaching a negative answer the Supreme Court of Michigan is squarely in conflict with the cases of *A. G. Spalding & Bros. vs. Edwards*, 262 U. S. 66 L. Ed. 865); *Carson Petroleum Company vs.*

Vial, 279 U. S. 96 (73 L. Ed. 626) and *Richfield Oil Corporation vs. State Board of Equalization*, 329 U. S. 69 (91 L. Ed. 80).

The case of *A. G. Spalding & Bros. vs. William H. Edwards, Collector of Internal Revenue*, supra, is undoubtedly the leading case upon this subject. There was involved a shipment of sporting goods from the United States to South America. This was accomplished through the purchase of goods in this country by an agent who received title from Spalding Bros. and transmitted the goods to the South American buyers. The Court held that the State of New York could not tax the goods in question inasmuch as they were in the course of interstate commerce from the time of purchase until their actual shipment. The defendant contended that inasmuch as an agent had received title to the goods in this country, that, therefore, the goods were subject to local taxation. Justice Holmes in his opinion said:

> "The very act that passed the title, and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export, and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. * * * Getting the bill of lading stands no differently from putting the goods on board ship. Neither does it matter that the title was in Scholtz & Company (agents), and that, theoretically, they might change their mind and retain the bats and balls for their own use. There was not the slightest probability of any such change and it did not occur. The purchase by Scholtz & Company was solely for the purpose of Delgado & Compania, and for their account and risk. Theoretical possibilities may be left out of account. * * *"

It has been pointed out that the appellant purchased the gasoline from the Midwest Refineries Company of

Grand Rapids and Alma, Michigan, from which points it was shipped by rail to Dearborn, Michigan. It was shipped on bills of lading marked for export (23, 24). Under the above quotation this act passed the title and had the transaction been a domestic one it would have made the applicant subject to the tax, but with the direction of a foreign sale upon the Bill of Lading it became tax immune.

As has been pointed out in the statement of facts, the bills of lading upon which the Joy Oil Company, Ltd., gasoline was shipped showed that the gasoline was destined to be exported to Canada. In the cited case the same precedure was followed as in the case at bar in the shipment of the gasoline in question. The case is full authority for the proposition here urged.

A case very similar to the case at bar on the facts is that of *Carson Petroleum Company vs. Vial*, 279 U. S. 95 (73 L. Ed. 626). The opinion in that case was delivered by Mr. Chief Justice Taft. The facts involved a situation where the Carson Petroleum, a corporation of Delaware, purchased oil from out of the state and by a system of tanks and pumps stored the oil in the State of Louisiana. The tanks and equipment were at St. Rose, a few miles above New Orleans, and no oil was sold at St. Rose, except that which was exported. The only business conducted there was in the unloading of oil from railroad tank cars into storage tanks and the loading of the oil from the storage tanks abroad the tankers for shipment to England, France and other ports. The oil was bought by the Carson Petroleum from refiners in the Mid-continent Field, comprising Kansas, Oklahoma, and Texas, and was shipped to St. Rose, Louisiana, in railroad tank cars consigned to the Carson Petroleum company. The shipments are not on through bills of lading, but on an export rate, which is lower than the domestic rate which is the situation in

the case at bar. The Carson Petroleum Company took orders for cargoes of oil from the foreign buyers, who chartered the ships to transport the oil from St. Rose to the foreign ports. The company always has orders on hand in excess of the quantity of oil at St. Rose, and buys the oil for the purpose of filling these orders. The oil in the railroad tank car is not segregated or assigned or destined to any particular cargo or shipment abroad, but is pumped into the large storage tanks, having the capacity of many tank cars, and is held in the tanks until a ship arrives, or until a sufficient quantity of oil is accumulated to make a cargo. The State of Louisiana attempted to impose a tax upon oil while stored in Louisiana pending trans-shipment to England.

The defendant's contention as in the case at bar, was that they were two separate shipments, the one which ended when the tank cars arrived and were unloaded at St. Rose and the foreign shipment which began when the oil was loaded abroad ship for the foreign port. It was contended that the oil was stored in the tanks at St. Rose under the protection of the state and local government and it was subject to state and local taxes, even though intended and prepared for export. Justice Taft stated as follows:

> "The crucial question to be settled in determining whether personal property or merchandise moving in interstate commerce is subject to local taxation is that of its continuity of transit. * * *"

He continued as follows:

> "The character of the shipment in such a case depends upon all the evidential circumstances looking to what the owner has done in the preparation for the journey and in carrying it out. The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if the other facts show that the journey has already

> begun in good faith and temporary interruption of the passage is reasonable, and in furtherance of the intended transportation, as in the Champlain Co. case. Here the case is even stronger in that the owner and initiator of the journey could not by his contract divert the logs after they had started from Swamp River without a breach of contract made by him with his vendee, who, by the agreement of sale, divided with him the responsibility for the continuous interstate transportation. * * *."

Such is the answer to the contention of the appellee here and the findings of the Michigan Supreme Court.

Justice Taft, in concluding in favor of the plaintiffs, made this statement:

> "* * * The use of the tanks at the point of trans-shipment cannot be distinguished from the storing of the lumber on the docks or in the slips between them till the vessel to carry it should be ready. The quickness of the trans-shipment in both cases was the chief object each exporter plainly sought. In both cases the selection of the point of shipment and the equipment at that point were solely for the speedy and continuous export of the product abroad and for no other purpose. No lumber or oil was sold there but that to be exported. There was no possibility of any other business there. Whatever hesitation might be prompted in deciding this case, if the Crain Case stood alone, the effect of the decisions of this court since is such as to make it inapplicable to the case before us."

In the present case it is also true, as in the cited case, that the tanks and equipment were at Dearborn convenient to the river front and no gasoline was sold at Dearborn at that point except that which was exported; that the only business conducted by the Joy Oil Company, Ltd., at Dearborn, was the unloading of the gasoline from the railroad tank cars into storage tanks and the loading of the gasoline from the storage tanks aboard

a tanker for shipment to Canada. The Michigan Supreme Court contended that these were two separate shipments, but in the cited case Chief Justice Taft overrules a like contention. Therefore, the cited case is full authority against the contention made here by the Michigan Supreme Court.

Incidentally in this case Mr. Chief Justice Taft referred to the case of *Coe vs. Errol*, supra, in the following language:

> "The crucial question to be settled in determining whether personal property or merchandise moving in interstate commerce is subject to local taxation is that of its continuity of transit. The leading case is that of Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. Rep. 475, in which Mr. Justice Bradley for this court laid down the principles that should be applied. It was a case of floating logs. There were two lots, one where the logs were cut in Maine, and were floated down the Androscoggin on their way to Lewiston, Maine but after starting on the trip were detained for a season in New Hampshire by low water. It was held that they were free from local taxation in New Hampshire because they had begun the interstate trip and the cause of detention was to be found in the necessities of the passage and trip back to Maine, which was held to be continuous. This ruling which was by the state court of New Hampshire was approved by this court. But, in respect to the other lot, this court found that the logs were gathered in New Hampshire in what the court termed an "entrepot," looking to ultimate transportation to another state, but that when taxed they had not started on their final and continuous journey, and hence were not in interstate commerce and were taxable."

The recent case of *Richfield Oil Corporation vs. State Board of Equalization, supra,* presents an exhaustive opinion in clear and strong language on this subject. The facts of the case were that the Richfield Oil Corporation

was engaged in producing and selling oil in California. It entered into a contract with the New Zealand Government for the sale of oil. The price was f.o.b. Los Angeles. Delivery was to the Naval Secretary, Navy Office, Wellington, New Zealand. The oil was consigned to the Naval-Officer-In-Charge at New Zealand. The oil was carried by pipe line from the refinery in California to storage tanks in the harbor where the naval tank steamer appeared to receive the oil. When the steamer had docked and was ready to receive the oil, it was pumped from the storage tanks into a naval tank steamer at Los Angeles. Customary shipping documents were given the master, including a bill of lading which designated the Richfield Oil Corporation as shipper and consigned the oil to the designated Naval Officer in New Zealand. The oil company filed with the Collector of Customs its shipper's export declaration. The State of California assessed a retail sales tax against the Richfield Oil Corporation on such shipments measured by the gross receipts from the transaction. The tax was paid under protest, and a claim for refund was filed asserting that the levy of the tax violated the provisions of Article I, Section 10, Clause 2, of the *Federal Constitution*. Mr. Justice Douglas in the opinion of the Court pointed out that it was not necessary to pursue the validity of the tax under the Commerce Clause, Article I, Section 8, Clause 2, but that the tax was unconstitutional under the Import-Export Clause, Article I, Section 10, Clause 2. In the course of the opinion he said:

> "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad.

Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad. It is true, as the Supreme Court of California observed, that at the time of the delivery, the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use. It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland port. The means of shipment are unimportant so long as the certainty of the foreign destination is plain.

"It seems clear under the decisions which we have reviewed involving Article I, Section 9, Clause 5, of the Constitution that the commencement of the export would occur no later than the delivery of the oil into the vessel. As the meaning of 'export' is the same under that Clause and the Import-Export Clause (citing cases), the same result follows here."

And further, on page 132:

"The prohibition contained in the Import-Export Clause against taxation on exports clearly involves more than a mere exemption from taxes laid specifically upon the exported goods themselves. That is true of the constitutional prohibition against federal taxes on exports. (citing cases). What was said there (p. 13, United States v. Hvoslef, 237 U S 1, 59 L. Ed. 813, 35 S. Ct. 459, Ann. Cas. 1916A 286) is equally applicable here. 'If it meant no more than that, the obstructions to exportation which it was the purpose to prevent, could readily be set up by legislation nominally conforming to the constitutional restriction but in effect over-riding it.' And see Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218, 77 L. Ed. 710, 53 S. Ct. 373.

> "We conclude that the tax which California has exacted from appellant is an impost upon an export within the meaning of Article I, Section 10, Clause 2, and is therefore unconstitutional."

An analysis of these last three cases establishes that the character of the commodity was that the gasoline in question was a commodity in foreign commerce. The tax that the City of Dearborn attempts to levy on the gasoline, which at all times was destined for export and in the process of export, is an impost upon an export within the meaning of Article I, Section 10, Clause 2 of the *Constitution of the United States* and is therefore an unconstitutional levy.

In the case at bar the Supreme Court of the State of Michigan relied upon cases involving interstate commerce and particularly upon taxes that were upheld because the interstate movement had not commenced at the time the tax was levied, but regardless of that fact it is not necessary in the case at bar to pursue the validity of the tax under the Commerce Clause, Article I, Section 8, Clause 2 of the *United States Constitution*. In that regard Mr. Justice Douglas said in the last cited case:

> "The two constitutional provisions, while related, are not coterminous. To be sure, a state tax has at times been held unconstitutional both under the Import-Export Clause and under The Commerce Clause (citing cases). But there are important differences between the two. The invalidity of one derives from the prohibition of taxation on the import or export; the validity of the other turns nowise on whether the article was, or had even been, an import or export (citing cases). Moreover, the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. It is well established that the Commerce Clause is a limita-

tion upon the power of the States, even in absence of action by Congress."

The commodity at issue here would only have been taxable while it was in the hands of the Midwest Refineries Company of Grand Rapids and prior to the time it had been delivered to a common carrier for transportation. Under the facts of the present case from the time it left Grand Rapids or Alma in railroad tank cars it became tax immune under the Export-Import Clause of the *United States Constitution*. The Assessment and levy made by the City of Dearborn was not constitutional. The purchase of gasoline by a foreign buyer and delivery made to a rail common carrier as a part of the journey in foreign commerce upon an export bill of lading was immune from local taxation, even though there would be a break in that journey for the purpose of storing the commodity to suit the convenience of further transportation.

CONCLUSION

The assessment and levy made by the City of Dearborn should be held invalid and the decision of the Supreme Court of Michigan reversed.

Respectfully submitted,

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